Cheah Cheng Lan v Heng Yea Lee

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO 2–728 OF 2000
LAMIN PCA, MOKHTAR SIDIN AND ABDUL KADIR SULAIMAN JJCA
6 FEBRUARY 2001

Civil Procedure *— Injunction — Ex parte injunction — Whether the court has inherent power to extend an ex parte injunction from time to time until disposal of main suit — Rules of the High Court 1980 O 29 r 1*

The applicant prayed for an order that the order of the High Court setting aside an ex parte injunction order be set aside and the ex parte injunction order continue to be in force and effect until the disposal of the applicant's appeal. The issue before the court was whether the court has an inherent power to extend an ex parte injunction order from time to time until the disposal of the main suit.

Held, dismissing the application:

By virtue of O 29 r 1 (2BA) of the Rules of the High Court 1980 ('the RHC'), the life of an ex parte injunction cannot go beyond the period of 21 days. The court has no power to extend the life of an ex parte injunction beyond 21 days because of the words 'shall automatically lapse'. It is beyond doubt that r 1(2BA) stresses the urgency and speedy disposal of the matter. With the operation of sub-r (2B) and (2BA) of O 29 r 1 the RHC, the life span of an ex parte injunction has been properly determined. It does not therefore admit the use of the inherent powers of the court as provided under O 92 r 4 of the RHC (see pp 436B, D, 437A).

[**Bahasa Malaysia summary**

Pemohon telah memohon untuk satu perintah agar perintah Mahkamah Tinggi yang mengenepikan satu perintah injunksi ex parte diketepikan dan perintah injunksi ex parte tersebut terus berkuat kuasa dan berkesan sehingga selesai rayuan pemohon. Isu yang dihadapkan ke mahkamah adalah sama ada mahkamah mempunyai kuasa yang sedia ada untuk melanjutkan satu perintah injunksi ex parte daripada masa ke semasa sehingga penyelesaian satu guaman utama.

Diputuskan, menolak permohonan tersebut:

Menurut A 29 k 1(2BA) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), tempoh hayat satu injunksi ex parte tidak boleh melebihi tempoh 21 hari. Mahkamah tidak mempunyai kuasa untuk melanjutkan tempoh hayat satu injunksi ex parte untuk melebihi 21 hari kerana perkataan-perkataan 'hendaklah serta merta tamat'. Adalah melampaui keraguan bahawa k 1(2BA) menekankan

keperluan tindakan segera dan penyelesaian yang pantas tentang perkara tersebut. Dengan penguatkuasaan sub-k (2B) dan (2BA) A 29 k 1 KMT, tempoh hayat satu injunksi ex parte telahpun ditentukan. Ia tidak oleh demikian menerima penggunaan kuasa sedia ada mahkamah sebagaimana yang diperuntukkan di bawah A 92 k 4 KMT (lihat ms 436B, D, 437A).]

Notes

For cases on injunction, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1927–2353.

Cases referred to

Lim Nyook Yin v Ultratech Sdn Bhd & Anor [1995] 1 MLJ 498; [1995] 1 CLJ 215 (refd)

UMAS Sendirian Bhd v RHB Bank Bhd & Anor [2000] 6 CLJ 564 (refd)

Legislation referred to

Rules of the High Court 1980 O 29 r 1(1), (2), (2B), (2BA), 92 r 4

Appeal from: Petition No 26–1 of 2000 (High Court, Seremban)

M Pathmanathan (*Sandraleka Asiriah* with him) (*M Pathmanathan & Co*) for the applicant.

Lim Kem Thuan (*Lim Kem Thuan & Co*) for the first and second respondents.

Lamin PCA . (delivering judgment of the court): The present motion first came before us on 7 December 2000 but it had to be postponed on an application by the learned counsel for the first and second respondents on the ground, according to him, that the notice of motion had yet to be served and the notice of hearing for that day was served by way of fax to his office at about 2.42pm the day before. The learned counsel further said that his client ought to be given leave to file an affidavit-in-reply. We then postponed the motion to 5 January 2001.

The applicant/appellant, by this motion prays for an order 'that the Order of the High Court dated 19 October 2000 setting aside an ex parte injunction order dated 29 March 2000 be set aside and the ex parte injunction order dated 29 March 2000 continue to be in force and effect' until the disposal of the applicant/appellant's appeal. In other words, the effect of the present application is to bring back to life the ex parte injunction granted on 29 March 2000 and to continue in full force and effect until the final disposal of the appeal by this court.

The learned counsel for the appellant/applicant, in support of his application, cited the case of *UMAS Sdn Bhd v RHB Bank Bhd & Anor* [2000] 6 CLJ 564. The learned judge in that case cited with favour the decision in *Lim Nyook Yin v Ultratech Sdn Bhd & Anor* [1995] 1 MLJ 498

and quoted a passage from the judgment of Abdul Malik Ishak J which reads:

> In *Lim Nyook Yin v Ultratech Sdn Bhd & Anor* [1995] 1 MLJ 498, His Lordship Abdul Malik Ishak J at p 503 said :
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> 'The proposition that Mr A Selvanathan has no right to apply for a return date whilst making an application for an ex parte interim injunction under O 29 r 1(2B) of the Rules of the High Court ('RHC') and, consequently, that the court has no power to fix a return date, is entirely without merit. The words, as suggested by Mr A Selvanathan appearing in O 29 r 1 (2B) of the RHC, especially the expression 'unless sooner revoked or set aside' would, by itself, give the power to the court to set a return date for an inter partes hearing. This is the best way for the defendants to revoke or set aside the ex parte interim injunction before the expiry of two weeks. … Now, with the insertion of r 1 (2B) to O 29 of the RHC, the rules committee must have intended that all ex parte interim injunctions be valid for two weeks and return dates be given forthwith, preferably before the expiry of the two weeks to enable the matter to be argued fully. It must also be pointed out that in the inter partes hearing, the ex parte interim injunction may be further extended inter partes until the disposal of the main suit. That the court has such an inherent power to make such an order is beyond dispute (see O 92 r 4 of the RHC).'

The above passage ends with a note that is capable of supporting the proposition that an ex parte injunction can be extended from time to time until the disposal of the main suit notwithstanding that under O 29 r 1(2B) of the Rules of the High Court 1980 ('the RHC') it remains effective for only two weeks (now amended to 21 days). We think the position should be made clear. For the purpose of the present application, it may be convenient that we repeat the provisions as provided under O 29 r 1 (1), (2) (2B) and (2BA) of the RHC.

> (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.
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> (2) Where the applicant is the plaintiff and the case is one of urgency such application may be made *ex parte* by summons supported by an affidavit but, except as aforesaid, such application must be made by summons.
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> (2A)…
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> (2B) Unless sooner revoked or set aside, an interim injunction obtained on an *ex-parte* application shall automatically lapse at the end of 21 days from the date on which it is granted.
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> (2BA)The *ex parte* interim injunction must be served on the relevant party within one week of the date of the order granting the interim injunction, and the court when granting the injunction must forthwith fix a date for *inter partes* hearing to be held before the expiry of the 21 days.

Where the case is one of urgency the plaintiff in the suit may apply to the court ex parte for an interim injunction under r 1(2) Now, the injunction obtained ex parte under the said r 1(2) 'shall automatically lapse' at the end

of 21 days from the date on which it is granted (r 1 (2B)). Rule 1 (2B) is prefixed by the phrase 'unless sooner revoked or set aside' and this must mean that the life of an ex parte injunction remains in force for only 21 days if it is not revoked or set aside before the expiry of 21 days because at the end of 21 days it 'shall automatically lapse.' Under r 1(2BA) the ex parte injunction 'must be served' on the relevant party within one week of the date of the order granting it and the court when granting the injunction 'must forthwith fix a date for the inter partes hearing to be held before the expiry of the 21 days'. Under r 1(2BA) it is made clearer that the life of an ex parte injunction cannot go beyond the period of 21 days. The ex parte injunction once obtained it is imperative that it be served within one week from the date it is obtained and on the day granting the injunction the court cannot postpone the fixing of the date of the inter partes hearing. It must on that day fix the date for the inter partes hearing and the date must be before the expiry of the 21 days. It is during the period of 21 days that all relevant decisions must be made such as either that it be revoked or set aside because at the end of 21 days it 'shall automatically lapse'. It is because that the decision to revoke or set aside must be made within the 21 days that the ex parte injunction once obtained must be served early (within seven days) so that the relevant parties may make the necessary preparation for appearing in court within the said period. The court has no power to extend the life of an ex parte injunction beyond 21 days because of the words 'shall automatically lapse' (see p 1353, *Malaysian High Court Practice: 1998* (Desk Ed) 1 MLJ). The learned judge in *Lim Nyook Yin* thought otherwise for he said at p 503 para E:

> It must also be pointed out that in the inter partes hearing, the ex parte interim injunction may be further extended inter partes until the disposal of the main suit. That the court has such an inherent power to make such an order is beyond dispute (see O 92 r 4 of RHC).

With respect we are unable to accept that the High Court has an 'inherent power' to make such an order under the said rule. If we may reproduce below O 92 r 4 of RHC. It reads:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

The very nature that an interim injunction being ex parte we are of the view that in order to prevent injustice or to prevent an abuse of the process of the court that its life span must be limited. Before the insertion of r 1(2B) in October 1993 [PU(A) 364/1993], an ex parte interim injunction obtained under r 1(2) remained effective until set aside. Without putting a limit to its life span, the word interim can have no concrete meaning and it may even be open to abuse. It was further found necessary to tighten up the screws so as the application of r 1(2B) would be more meaningful, so r 1(2BA) had to be brought in. This new rule does not tolerate delay so that it spells out the time limit within which the interim injunction must be served. Also, on the day the ex parte interim injunction is granted, the court granting it must

'forthwith' fix a date of hearing inter partes and that it must be held 'before the expiry of the 21 days.' It is beyond doubt that r 1(2BA) stresses the urgency and speedy disposal of the matter. With the operation of sub-r (2B) and (2BA), the life span of an ex parte injunction has been properly determined. It does not therefore admit the use of the inherent powers of the court as provided under O 92 r 4.

For the above reasons we dismissed the motion with costs.

Application dismissed.

Reported by Jafisah Jaafar